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Case No. 432

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

LOCAL 63

TEXTILE WORKERS UNION OF AMERICA, C. I. O.

Petitioner

VS.

CHENEY BROTHERS

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT, and THE SUPERIOR COURT, HARTFORD COUNTY, CONNECTICUT

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Local 63, Textile Workers Union of America, C. I. O. prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Errors of the State of Connecticut rendered May 18, 1954, directing the Superior Court, Hartford County, to enter judgment.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the Superior Court of Hartford County, (R. 11) printed in Appendix B hereto, *infra*, p. 14, is not yet reported. The opinion of the Supreme Court of Errors, (R. 213) printed in Appendix B, hereto, *infra*, p. 23, is not yet reported.

JURISDICTION

The decision of the Supreme Court of Errors directing the entering of judgment was rendered on May 18, 1954 and announced on May 25, 1954. (R. 213), *infra*, p. 23. A timely Motion for Reargument was filed June 12, 1954 (R. 209), *infra*, p. 37. Rehearing as to the question here presented was denied, on June 16, 1954. Rehearing was granted on one ground. (R. 212), *infra*, p. 40.[1] An application for an extension of time within which to file this Petition for Certiorari until after reargument in order that its scope might be determined, to and including November 13, 1954, was granted by Mr. Justice Burton on July 8, 1954. The jurisdiction of the court rests on 28 U. S. C. A., Section 1257 (3) since Petitioner claims that by the decision of the Supreme Court of Errors it was denied due process of law and equal protection of the laws in violation of Article XIV of the Constitution of the United States of America.

QUESTION PRESENTED

Respondent, a manufacturer of textiles, unilaterally submitted for arbitration the questions of whether Petitioner union should accept for the employees which it represents: (1) A reduction in pay to offset an increase granted in March, 1951 and (2) a revision of its cost-of-living allowance provided by Section 9 of its Collective Bargaining Agreement. Both questions were submitted under Section 5 of the Agreement which provides for arbitration in the event of a disagreement over a "basic rate of pay." Petitioner filed an application to vacate the award handed down by the arbitrator contending that the award on both questions submitted did not conform to the submission and was not definite and final and that the cost-of-living provision, a separate contract provision, was not a "basic rate of pay" and was not subject to modification

[1] See, *infra*, p. 9 as to finality of judgment.

by arbitration. The trial court did not pass on the question of arbitrability but vacated the award on the grounds that it did not conform to the submission and was not final and definite as to either question decided. The Supreme Court of Errors, reversed the trial court and "corrected" and confirmed the award holding that the question of modification of the cost-of-living clause was arbitrable under Sections 12B and 15 of the Agreement, a theory which had not been presented to the trial court or to that Court, and on which Peitioner had not had an opportunity to present evidence or argument. Petitioner's Motion for Reargument on the question of the modification of the cost-of-living allowance was denied. The question presented is:

1. Whether the Supreme Court of Errors denied Petitioner due process of law and equal protection of the laws in contravention of Article XIV of the Constitution of the United States by summarily deciding an issue, not properly before it, on grounds outside the scope of the controversy and on which Petitioner had not had an opportunity to present evidence or be heard.

CONSTITUTIONAL PROVISION

Article XIV of the United States Constitution, Section 1:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jursdiction the equal protection of the laws."

STATUTES INVOLVED

The statutes involved are Sections 8161 and 8162 of the General Statutes of Connecticut (Revision of 1949) which are printed in Appendix A, *infra*, pp. 13, 14.

STATEMENT

Petitioner union, which represents 1600 employees of Respondent's textile manufacturing plant in Manchester, Connecticut, on January 15, 1953, filed an application under Section 8161 of the General Statutes of Connecticut (Revision of 1949) to vacate a labor arbitration award. The award involved the following questions both submitted as changes in "basic wages" to the arbitrator by Respondent under Section 5[2] of its Collective Bargaining Agreement with Petitioner, the Petioner having refused to join in the submission:

> "On September 17, 1952, the company asked the union to agree to the following modifications in the company's basic rates of pay per unit of time.
>
> "1. A direct wage decrease of 9¾ cents per hour for all employees covered by the current agreement, to offset the wage increase which became effective on March 26, 195[1].
>
> "2. Revision of our cost of living formula (Section 9, the current agreement) by providing for adjustment upon each change of 1.32 points in the applicable index instead of 1.153 points."[3] (R. 28)

On December 28, 1952, the arbitrator made the following award, which by its language did not conform to the submission and was not decisive of the issues submitted:

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[2] Section 5 is printed in Appendix C, *infra*, p. 40
[3] Section 9 is printed in Appendix C, *infra*, p. 41

"1. Beginning with the first payroll period which commences after December 31, 1952, all hourly rates and base rates shall be reduced by 9.75 cents. Piece rates and plant hiring minimum rates shall be adjusted accordingly.

"2. Beginning with the first payroll period which commences after December 31, 1952, Section 9 of the collective bargaining agreement between the parties dated August 1, 1952, shall be modified so as to provide for a 1 cent cost-of-living adjustment for every 1.32 index points' change in the U. S. Bureau of Labor Statistics Consumers' Price Index for Moderate Income Families in Large Cities, Old Series. The February, 1951, Index of 184.2 shall continue to be used as the starting point in calculating changes in the cost of living. The effect of this will be to reduce the Cost-of-Living Allowance payable for the current quarter from 7 cents to 6 cents per hour." (R. 29)

Petitioner's application to vacate was based on the grounds that the award was not final and definite as to either issue submitted and that the arbitrator lacked power to determine the second question submitted because the cost-of-living formula was not a "basic wage" which could be reopened at any time and submitted to arbitration in the event of disagreement and was not, therefore, arbitrable under its Collective Bargaining Agreement. Petitioner alleged in its application to vacate that Section 9 could only be modified by agreement in accordance with Section 15[4] which did not provide for arbitration in the event of disagreement.[5] Respondent filed

[4] Section 15 is printed in Appendix C, *infra*, p. 43

[5] Paragraph 5 (b) of Petitioner's application to vacate alleged:

"(b) The award undertakes to revise the cost of living formula which is fixed by a contract provision (Section 9 Agreement, page 13, 'Exhibit' A) and cannot be modified except in accordance with Section 15 of the contract which does not provide for arbitration." (R. 4)

an answer and cross application seeking correction and confirmation of the award as corrected. Defendant in its answer and cross application categorically denied Petitioner's contention.[6] As it was clear from Respondent's categorical denial of this allegation that it was not seeking to modify the contract provision under Section 15, Petitioner was under no duty to introduce any evidence or make any argument that the issue was *not* arbitrable under that section. It was, in fact, precluded from doing so. Respondent contended: (1) "under Sections 5D and 5E of the Collective Bargaining Agreement and the course of conduct of the parties in submitting the matter to arbitration, the arbitrator was empowered to award upon the controversy over revision of the cost-of-living allowance as well as the direct wage reduction," and (2) "Plaintiff's conduct down to the date of its original application to the Superior Court in this cause precluded it from asserting that the arbitrator lacked power to award upon the controversy over the cost-of-living allowance." (Assignment of Errors, R. 42). The Superior Court of Hartford County refused to pass upon the question of whether the cost-of-living clause was arbitrable[7] but vacated the award in its entirety on the grounds that the award did not conform to the submission and was not a final and definite award as to either issue.[8] Respondent, Cheney Brothers, appealed to the Supreme Court of Errors. The question of whether or not the second issue was arbitrable

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[6] "4. Paragraph 5 of the plaintiff's application, as amended, is denied." (R. 6)

[7] "It is not necessary to consider whether, if proper steps were taken under this section [Section 15 of the contract] to modify Section 9 [the cost-of-living clause] of the agreement, such modification would be a subject for arbitration under Section 12. The company claims here that the so-called 'escalator' clause was arbitrable as a wage item subject to re-opening as such. It was submitted to the arbitrator as a modification 'in the Company's basic rates of pay per unit of time'.

"Without discussing the merits of that claim it is sufficient to consider only the terms of the award as applied to the questions submitted." Opinion, Alcorn, J. (R. 16) Appendix B, *infra*, p. 21.

[8] Findings 52, 53, 63 and 68, R. 32, 33.

was not presented to the Supreme Court of Errors as it had not been decided by the trial court and was not properly before it. Section 409, Connecticut Practice Book (1951) provides:

> "Sec. 409. *Errors considered.* This court shall not be bound to consider any errors on an appeal unless they are specifically assigned and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial."

The Supreme Court of Errors has in the past consistently refused to decide claims not passed upon by the trial court, *Woodstock* v. *The Retreat, Inc.*, 125 Conn. 53, 59, 3 A2d 232; *Pyskoty* v. *Sobusiak*, 109 Conn. 593, 598, 145 Atl. 58; *Seigel* v. *Heimovitch*, 121 Conn. 207, 213, 183 Atl. 741; *Newington* v. *Mazzoccoli*, 133 Conn. 146, 157, 48 A 2d 729.

On May 18, 1954, the Supreme Court of Errors reversed the trial court and, holding that the question of modification of the cost-of-living clause was arbitrable under Sections 12 and 15 of the Collective Bargaining Agreement, remanded the case with direction to modify and correct the award and confirm it as modified.

Section 12[9] of the Collective Bargaining Agreement establishes a procedure for adjustment of grievances which culminates in arbitration. Section 15[10] contains a general reopening clause but does not provide for arbitration in the event the parties do not come to an agreement. Section 9 covering the cost-of-living allowance does not provide for reopening or arbitration. The decision of the Supreme Court of Errors

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[9] Section 12 is printed in Appendix C, *infra*, p. 41

[10] Section 15 provides in pertinent part:

"Sec. 15. Termination date and modification. * If during the life of this Agreement and not at a termination date, either party desires to modify this Agreement, such party shall give the other party written notice of such desire sixty days prior to the date of such proposed modification."* * *

holding that Section 9 of the contract is subject to modification by arbitration constitutes an adjudication that *all* contract provisions of the Collective Bargaining Agreement are subject to modification by arbitration if the procedural requirements of those sections are met. Petitioner had no opportunity to introduce evidence to the effect that the procedural requirements of these sections had not been complied with. Petitioner had no opportunity to introduce evidence that at no time during the period the contract had been in effect had either the Petitioner or Respondent interpreted these sections to mean that all contract provisions subject to modification by agreement under Section 15 could be modified by arbitration. Nor did it have an opportunity to present its legal arguments against the interpretation adopted by the court. Nor even to present to the court the importance of the question adjudicated.

HOW FEDERAL QUESTION PRESENTED

On June 12, 1954, Petitioner filed a timely Motion for Reargument on seven grounds;[11] only the second and third grounds of which related to the cost-of-living allowance. The other grounds related to the question of the general decrease.

Grounds 2 and 3 were as follows:—

"2. The question decided by the Court of whether the escalator clause of the Union's contract is subject to arbitration under the contract was not before the Court, not having been decided by the lower court.

"3. The Court's holding that the escalator clause was arbitrable under Sec. 12(B) of the contract has far reaching effects going beyond the scope of the present case. It constitutes an adjudication that all contract provisions laboriously negotiated by the parties and agreed upon for a term of five years are subject to modfication by arbitra-

[11] The motion (R. 209,) is printed in Appendix B, *infra*, p. 37.

tion. This question was determined by the Court without affording either party an opportunity to be heard thereby depriving the plaintiff of property without due process of law and depriving it of equal protection of the laws both in violation of Article XIV of the Constitution of the United States of America."

The Supreme Court of Errors denied the Motion as to the 2nd, 3rd, 4th, 5th, 6th and 7th grounds and granted it as to the first ground which was restricted to the first issue submitted to the arbitrator, the general decrease to offset the March, 1951 increase.[12] The Federal question was raised in the Motion for Reargument which constituted Petitioner's first and only opportunity to raise said question. The action of the court in denying the Motion for Reargument on the second and third ground constituted final action on the cost-of-living issue.[13] No judgment has been entered in view of the fact that the judgment of the court on the first issue is not yet final. Nevertheless, the action of the court on the cost-of-living issue here presented is severable and final as the only thing which remains to be done is the purely ministerial act of entering the judgment. *Clark* v. *Williard*, 292 U.S. 112, 117-19. *Board of Commissioners* v. *Lucas*, 93 U.S. 108; *Mower*

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[12] Reargument was had on October 14, 1954. The case is presently under advisement.

[13] Under the Connecticut rules of practice (Sec. 464 Connecticut Practice Book 1951) when the Supreme Court of Errors has handed down an opinion in any case, the reporter sends the rescript (that portion of the opinion which directs judgment) to the Clerk of the Supreme Court of Errors in the County where the original judgment was rendered. Section 461 of the Conn. Practice Book (1951) provides:

"Sec. 461. *Judgment files.* Judgments of this court shall be embodied in judgment files, to be drawn and signed by the clerk of this court in the county where the case was tried, and duly recorded. Unless the court otherwise directs, judgments and orders of this court shall be deemed to have been rendered or made on the date noted on the rescript or other notice sent to the clerks of this court as provided in Sec. 464, and such judgments or orders shall be entered as of that date."

v. *Fletcher*, 114 U.S. 127; *Rio Grande Western R. Co.* v. *Stringham*, 239 U.S. 44; *Cole* v. *Violette*, 319 U.S. 581; *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68.

The decision of the Supreme Court of Errors was unexpected; the Petitioner had no opportunity prior to its motion for reargument to raise the question as it could not have anticipated the court's action.

Petitioner contends that the folowing cases sustain said jurisdiction:

Saunders v. *Shaw*, 244 U. S. 317, 320

Great Northern R. Co. v. *Sunburst Oil Co.*, 287 U.S. 358, 366-7

Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U.S. 673, 677-8

Lutcher & Moore Lumber Co. v. *Knight*, 217 U.S. 257, 264

Missouri ex rel Missouri Ins. Co. v. *Gehner*, 281 U.S. 313, 320

Cole v. *Arkansas*, 333 U.S. 196, 200

REASONS FOR GRANTING THE WRIT

The question which Petitioner asks this Court to review involves one of the oldest and most cherished rights of all free people, the right to procedural due process in the courts, the right to be heard before being judged. The Constitution reposes in this Court, through its supervisory powers, the protection of this right against infraction by inferior courts. Petitioner has no forum other than this Court where it can present its case.

The question also involves one of our most recently recognized rights. The collective bargaining agreement is perhaps

the greatest contribution of the Twentieth Century to our industrialized society. There is no need to point out to this Court the role of the collective bargaining agreement in establishing the stability and peaceful climate necessary to mantain maximum production and a healthy economy. The law as it pertains to the collective bargaining agreement is in the process of formulation and evolution and, therefore, represents a peculiarly sensitive field. It is one where the overall guidance of this Court is required when state courts fail to recognize the far-reaching effects of their decisions.

The specific issue presented to the Superior Court was whether the contract provision covering the cost-of-living clause was subject to modification by arbitration under the contract as a "basic rate of pay" and, if so, whether Petitioner by taking part in the arbitration waived or was estopped from raising the issue in the courts. This question was not passed on by the trial court and was not properly before the Supreme Court of Errors. It was not, therefore, argued by Petitioner either in its briefs or orally. The Supreme Court of Errors did not remand the case to the trial court, as is customary, to decide the narrow issue presented to the trial court but decided without evidence or argument that the contract provision (Section 9) was subject to modification by arbitration under Section 15 of the contract, a general reopening clause, and Section 12 of the contract which provides for arbitration of grievances. This holding constitutes an adjudication that all contract provisions, established to bind and govern the parties until August 1, 1957, are subject to modification by arbitration. The Court, having heard no argument on the question, evidently failed to grasp the importance of its decision not only to the 1600 employees represented by Petitioner but to all companies and unions in Connecticut having a general reopening clause in their contracts.

It is respectfully submitted that the Supreme Court of Errors of Connecticut so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioner requests that the Supreme Court of Errors be reversed and the case remanded to the trial court with directions to determine the issue of the arbitrability of the modification of the cost of living issue on the grounds presented at the trial.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IRVING S. RIBICOFF

Counsel for Petitioner

APPENDIX A

Statutes:

Section 8161 of the Gen. Stats. of Conn. (1949 Rev.)

> "Sec. 8161. *Vacating award.* In any of the following cases the superior court of the county in which one of the parties resides or, in a controversy concerning land, of the county in which the land is situated or, when said court shall not be in session, any judge thereof, shall make an order vacating the award upon the application of any party to the arbitration: (a) If the award shall have been procured by corruption, fraud or undue means; (b) if there shall have been evident partiality or corruption on the part of the arbitrators or either of them; (c) if the arbitrators shall have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; (d) if the arbitrators shall have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject-matter submitted was not made. If an award shall be vacated and the time within which the award is required to be rendered shall not have expired, the court or judge may direct a rehearing by the arbitrators."

Section 8162 of the Gen. Stats. of Connecticut (1949 Rev.):

> "Sec. 8162. *Correction of award.* For any of the following causes the superior court of the county in which one of the parties resides or, in a controversy concerning land, of the county in which the land is situated or, when said court shall not be in session, any judge thereof, shall

make an order modifying or correcting the award upon the application of any party to the arbitration: (a) If there shall have been an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award; (b) if the arbitrators shall have awarded upon a matter not submitted to them unless it be a matter not affecting the merits of the decision upon the matters submitted; (c) if the award shall be imperfect in matter of form not affecting the merits of the controversy. The order shall modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

APPENDIX B

Decisions below:

OPINION SUPERIOR COURT, HARTFORD COUNTY

The plaintiff, hereinafter referred to as the Union, brings this application to vacate an arbitration award pursuant to Section 8161 (d) General Statutes, Revision 1949, upon the ground that the arbitrator exceeded his powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made. The defendant, hereinafter referred to as the Company, in an answer and cross application seeks a correction of the award pursuant to Section 8162 (c) General Statutes, Revision 1949, for imperfection of form. The parties are in accord that the award is not final and definite to adjudicate the questions submitted to the arbitrator and the issue is whether the defect is one of substance, requiring that the award be vacated, or a matter of form permitting its correction.

By amendment the Union claims that the award is invalid for not having been made within the time required, Section 8159, General Statutes, Revision 1949, and seeks, in addition to an order vacating the award orders "that said award be declared to have no legal effect" and "that defendant be ordered to restore the rates of pay in effect for the period preceding January 5, 1953, as of January 5, 1953."

The Union has represented the Company's production and maintenance employees as bargaining agent since 1937. Effective March 26, 1951, the Company, after negotiations with the Union, granted a general wage increase approximating 9¼ cents per hour for about 1600 hourly and piece work employees. The increase did not affect about 20 engravers. At the same time a cost-of-living escalator agreement was reached providing for a one cent quarterly wage adjustment for every 1.153 points change in the "U.S. Bureau of Labor Statistics Consumer Price Index for Moderate Income Families in Large Cities — Old Series."

Effective August 1, 1952 the Union and the Company entered into a written collective bargaining agreement superseding a similar previous agreement. The agreement, so far as now material, provided in Section 5 concerning Wages that:

> "The Company or the Union may reopen the question of basic rates of pay per unit of time or minimum wages, with intent to make changes, . . .
>
> "Any difference which may arise with respect to the Company's action in these matters shall be handled in accordance with Section 12. (Adjustment of Grievances.)"

Section 9 provided for a Cost-of-Living Allowance on the basis agreed upon in March 1951, as already described. This section of the contract also provided that:

"Adjustments shall be made four times a year, either upward or downward, effective the first Monday in July, October, January and April based upon the Index for May, August, November and February respectively."

Section 12 of the contract provided for the adjustment of grievances by arbitration.

At a meeting between the Union and the Company on September 17, 1952, the Company proposed a wage reduction to offset the increase which had been granted in March 1951 and a revision of the cost-of-living clause of the contract. The Union refused to agree and the Company requested the Union to join in arbitration under the contract. The Union again did not agree and on October 10, 1952, the Company, as permitted by the contract, submitted to the American Arbitration Association the following request for arbitration:

"On September 17, 1952, the Company asked the Union to agree to the following modifications in the Company's basic rates of pay per unit of time:

"1. A direct wage decrease of 9¾ cents per hour for all employees covered by the current agreement, to offset the wage increase which became effective on March 26, 1952.

"2. Revision of our cost-of-living formula (Section 9 of the current agreement) by providing for adjustment upon each change of 1.32 points in the applicable index, instead of 1.153 points."

The parties agree that the date March 26, 1952 referred to is an error and was intended to be March 26, 1951.

Thereafter the American Arbitration Association, which serves only as a medium for the selection of arbitrators, took its usual steps to provide an arbitrator, and on November 13,

1952, an arbitrator was selected and accepted his appointment. Thereafter the arbitrator held hearings at the Company's offices on November 25th and 26th, 1952, at which both parties appeared and were heard and the Company, but not the Union, was represented by counsel. By agreement of the parties the time within which the arbitrator might, under the arbitration rules, make his award was extended from December 26, 1952 to January 6, 1953. On December 31, 1952, the arbitrator made his award in the following terms:

> "1. Beginning with the first payroll period which commences after December 31, 1952, all hourly rates and base rates shall be reduced by 9.75 cents. Piece rates and plant hiring minimum rates shall be adjusted accordingly.
>
> "2. Beginning with the first payroll period which commences after December 31, 1952, Section 9 of the collective bargaining agreement between the parties dated August 1, 1952 shall be modified so as to provide for a 1 cent cost-of-living adjustment for every 1.32 index points' change in the U. S. Bureau of Labor Statistics Consumers' Price Index for Moderate Income Families in large Cities, Old Series. The February 1951 Index of 184.2 shall continue to be used as the starting point in calculating changes in the cost of living. The effect of this will be to reduce the Cost-of-Living Allowance payable for the current quarter from 7 cents to 6 cents per hour."

Thereafter the representatives of the Union and the Company met to discuss the steps necessary to carry out the award. The discussion indicated uncertainty in the minds of both parties as to the meaning of the award. The Company has never sought to take advantage of any lack of clarity and has, throughout, insisted that the award is to be understood to give it no more relief that it sought in the discussions with the

Union prior to the arbitration and in the questions submitted to the arbitrator. On the other hand, the award, by its terms, directs a reduction in wages in some cases below the level of March 26, 1951, which was in issue.

With the award the arbitrator simultaneously filed a lengthy opinion setting forth his reasons. The rules of the arbitration designated by the contract permitted but did not require this procedure. The Company takes the position that the opinion forms a part of the award. Schoolnick v. Finman, 108 Conn. 478, 481. It seems clear, however, that the arbitrator, under the permitted procedure, and in view of the form of the award, intended the award to be the document designated as such which contained the decision already quoted, and that he filed the opinion as a separate explanatory document. "The award must of course contain that actual decision of the arbitrators which is the result of their consideration of the various matters submitted to them. But it need contain nothing else. The means by which they have come to this conclusion, the reasoning or the principles on which they base it are, unless the submission otherwise requires, needless and superfluous." In re Curtis-Castle Arbitration, 64 Conn. 501. 513.

The evidence shows that, in the case of piece workers, an intricate mathematical computation was used to effectuate the March 26, 1951 increase, designed to provide a schedule by which piece workers as well as hourly employees would receive approximately the same rate of increase. The Company's object in the arbitration was to invoke the same process to eliminate the increase. An examination of the arbitrator's opinion indicates that he intended by paragraph (1) of the award only to eliminate the March increase. The lack of clarity arises from the fact that, as the parties agree, the phraseology of the award would permit a more extensive reduction.

As was said in United States Time Corporation v. Waterbury Watch Workers Union, 15 Conn. Supp., 391, 395, "In any event, it is the award, not the finding and conclusion of fact, which controls, and the award cannot be found to be indefinite because of some apparent inconsistency between it and the finding of facts." The difficulty here arises from the use of the terms "hourly rates," "base rates," "piece rates" and "plant hiring minimum rates" in the award. The Company uses similar as well as other terms in its wage structure. The meaning given to like or similar terms by the Company was not explained to the arbitrator, however. The formula by which the Company computed the March 1951 increase was not explained to the arbitrator. The terms used in the award cannot, therefore, relate to the Company's method of calculating the increase.

In the computations to arrive at the March 1951 increase the Company had increased what it called its "hiring rate" six cents per hour. It had increased what it called its "minimum rate" five cents an hour. It had increased its hourly workers nine and three-quarters cents an hour. The numerous piece work operations involved various "base rates." There are some 140 piece work operations and many thousand "piece rates." A computation was made for each piece work operation and the result was applied to each "piece rate." The Company had increased "base rates" for piece workers by a computation designed to produce an average increase of 8.1 cents. This did not, however, represent an actual increase of that amount in each "base rate." Finally, the overall increase described as 9¼ cents represented only an approximated average for all employees involved. In actuality some employees conceivably received more or less than that increase.

The first question submitted to the arbitrator, therefore, contained a confusing contradiction in terms. "A direct wage

decrease of 9¾ cents per hour" was not, due to the calculations involved, necessarily the same for all employees as a wage decrease "to offset the wage increase which became effective on March 26, 19(51)."

"The use of arbitration should be encouraged. It is true that the beneficial results of the procedure can be realized only when the agreement to arbitrate is drafted with care to comply with legal requirements. The same may be said of the submission. It should state the specific question to be decided with definiteness and it should be of such a nature that the award which follows will answer the question with exactitude. In this manner, a judgment of the court entered thereon will be an enforceable and binding judgment. When these requirements are met, arbitration deserves the enthusiastic support of the courts." International Brotherhood of Teamsters v. Shapiro, 138 Conn. 57, 68-69.

This submission would have been more accurate if the question had been confined to offsetting the increase which had become effective, and had omitted reference to a "direct wage decrease of 9¾ cents per hour."

The award in turn is not a final and definite answer to the real question at issue when it directs that "all hourly rates and base rates shall be reduced by 9.75 cents. Piece rates and plant hiring minimum rates shall be adjusted accordingly."

The arbitrator's opinion indicates that the form and presentation of the submission led him to consider the proposition presented as primarily "a direct wage decrease of 9¾ cents per hour." He considered it from the standpoint of the general course of wage adjustments previously reached by the parties, and of those prevailing in similar plants elsewhere. *He arrived at the basic conclusion that wages should revert to the March*

1951 level. Lacking information, however, as to how that level had been increased, his award is not phrased to eliminate that increase.

The situation thus created is more than procedural. A correction could be made if it did not affect the merits of the controversy. Section 8162, General Statutes. But the court has no power to make a correction which does affect the merits of the controversy. Pratt, Read & Co. v. United Furniture Workers, 136 Conn. 205, 208. Any correction of this award which would adapt it to the Company's wage formula would materially alter the arbitrator's conclusion in a substantive way. The court cannot thus substitute its independent judgment in place of a judgment on the award.

The award upon the first point is not mutual, final and definite upon the subject matter. There remains for consideration the award upon the second point, namely, the cost-of-living allowance.

The contract between the parties treats of wages in Section 5 as an item separate and distinct from the cost-of-living allowance, which is the subject of Section 9. Section 5 concerning wages, as already indicated, provides for reopening and arbitration. Section 9, concerning the cost-of-living allowance contains no provision for reopening or reconsideration. Section 15 of the agreement, however, provides that "If during the life of this Agreement and not at a termination date, either party desires to modify this Agreement, such party shall give the other party written notice of such desire sixty days prior to the date of such proposed modification."

"It is not necessary to consider whether, if proper steps were taken under this section to modify Section 9 of the agreement, such modification would be a subject for arbitration

under Section 12. The Company claims here that the so-called "escalator" clause was arbitrable as a wage item subject to re-opening as such. It was submitted to the arbitrator as a modification "in the Company's basic rates of pay per unit of time."

Without discussing the merits of that claim it is sufficient to consider only the terms of the award as applied to the question submitted. The only revision sought was a change in the points of the applicable index from 1.153 to 1.32. If the award had confined itself to that narrow issue then the language of the contract, Section 9, quoted above, would govern the time when the adjustment should be made and upon what index. The award as made, however, specifies that the index point change shall be effective "(b)eginning with the first payroll period which commences after December 31, 1952" and concludes "The effect of this will be to reduce the Cost-of-Living Allowance payable for the current quarter from 7 cents to 6 cents per hour." In so deciding the arbitrator went beyond the scope of the submission and by so doing exceeded his powers. Pratt, Read & Co. v. United Furniture Workers (supra), 208.

The claim that the award was not timely is without merit. Section 8159, General Statutes. That statute is directory rather than mandatory. International Brotherhood of Teamsters v. Shapiro (supra), 68. Furthermore, the submission was on November 13, 1952, the award was made on December 31, 1952, and within a period agreed to by the parties.

An order may enter vacating the award.

ALCORN, J.

Filed Apr. 13, 1953.

Date of Supreme Court Judgment, May 18, 1954

Decision Announced, May 25, 1954

OPINION SUPREME COURT OF ERRORS

LOCAL 63, TEXTILE WORKERS UNION OF AMERICA, C. I. O. *v.* CHENEY BROTHERS

Application to vacate an arbitration award, and for other relief, brought to the Superior Court in Hartford County, where the defendant filed an application to correct the award and the issues were tried to the court, *Alcorn, J.*; judgment vacating the award and appeal by the defendant. *Error; judgment directed.*

Wesley A. Sturges, with whom were *Pomeroy Day* and *William K. Cole*, for the appellant (defendant).

A. A. Ribicoff, with whom was *Louise H. Hunt*, for the appellee (plaintiff).

INGLIS, C. J. The judicial phase of the controversy between the parties to this appeal began on January 15, 1953, when the plaintiff, acting under §8161 (d) of the General Statutes, applied to the Superior Court to vacate an arbitration award rendered against it and in favor of the defendant. The latter filed an answer and a cross application in which correction and confirmation of the award, as corrected, were sought. The court decided that the award ought to be vacated. From the judgment entered thereon the defendant has appealed.

The finding, which is not subject to correction, recites the following facts: For many years, the defendant, hereinafter called the company, has operated a textile plant in Manchester and, since 1937, has recognized the plaintiff, hereinafter called the union, as the bargaining representative of its production and maintenance employees. Long-term agreements affecting the labor relations of the parties were successively concluded by them as of March 30, 1942, August 1, 1947, and Au-

gust 1, 1952. All three agreements contained a provision permitting either party at any time to reopen the question of wages and to seek a revision of the previously established rates. It was further provided that, if the union objected to any request by the company for a reduction in wages, the differences between the parties were to be resolved by proceedings culminating, when necessary, in arbitration under the industrial arbitration rules of the American Arbitration Association.

On March 26, 1951, as a result of negotiations between the parties, the company gave a general wage increase to about 1600 employees. The increase did not affect about twenty engravers. The hourly rate employees, that is, those compensated on the basis of a definite amount of money for each hour worked, were now to receive a flat 9.75 cents an hour more. The rates of pay for all other employees except engravers were then computed so as to give them an increase comparable to the 9.75 cents per hour. Since the wages of pieceworkers were determined, not by the number of hours worked, but by the number of units produced during a given unit of time, the fixing of the many thousands of piece rates prevailing in the plant to conform to the increase of 9.75 cents in the hourly rate had to be done by intricate mathematical computation. The upshot of the wage increase of March 26, 1951, was as follows: (1) Hourly rate employees, totaling 850, were to receive 9.75 cents an hour more; (2) 20 engravers were to get no additional pay; (3) "base rates" for pieceworkers, totaling 750, were fixed at an amount which would produce an average increase of 8.1 cents an hour; (4) the "hiring rate" was increased 6 cents an hour and affected 10 employees; (5) the "minimum rate"[1] was increased 5 cents an hour and affect-

[1] New and inexperienced employees were paid at an hourly rate called the "hiring minimum" for a beginning period of not more than six weeks, after which the lowest wage that any production or maintenance employee (whether on an hourly or piece rate) could receive was a somewhat higher hourly rate called the "plant minimum" rate.

ed 40 employees. The increases thus granted represented an estimated average of 9.75 cents per hour for all the employees affected. In actuality, many received more and many less than this average. As a result of the various computations, however, the over-all increase described as 9.75 cents per hour was considered to be approximated for all employees involved.

As of the date the wage increase became effective, the parties incorporated into their bargaining agreement a cost-of-living "escalator" clause. A 1 cent quarterly wage adjustment, up or down, was automatically to follow every change of 1.153 points in the consumer price index of the United States bureau of labor statistics, but no adjustment which would reduce the rates of pay below those which were effective on March 26, 1951, was to be made through this process.

On September 17, 1952, the company proposed (1) a wage reduction to offset the increase granted on March 26, 1951, and (2) a revision of the escalator clause. Both proposals were rejected. The company then asked the union to join in submitting the dispute to arbitration under the agreement, but the union refused to do so. On October 10, 1952, the company forwarded a written request for arbitration to the American Arbitration Association and sent a copy thereof to the union. The request was for the arbitration of two matters, expressed by the company in the following language:

"1. A direct wage decrease of 9¾ cents per hour for all employees covered by the current agreement, to offset the wage increase which became effective on March 26, 1951.

"2. Revision of our cost of living formula (Section 9 of the current agreement) by providing for adjustment upon each change of 1.32 points in the applicable index instead of 1.153 points."

In conformity with its rules, the American Arbitration Association selected an arbitrator who, on November 25 and 26, 1952, held hearings in which both the company and the union participated. At these hearings the arbitrator was not advised of the meaning of "hourly rates," "base rates," "piece rates," "plant minimum rates" and "hiring minimum rates," as those expressions were used by the company in its wage structure, nor was he told of the method by which the wage increase of March 26, 1951, was computed and fixed for the various types of wage earners.

On December 28, 1952, the arbitrator made the following award:

"1. Beginning with the first payroll period which commences after December 31, 1952, all hourly rates and base rates shall be reduced by 9.75 cents. Piece rates and plant hiring minimum rates shall be adjusted accordingly.

"2. Beginning with the first payroll period which commences after December 31, 1952, Section 9 of the collective bargaining agreement between the parties dated August 1, 1952 shall be modified so as to provide for a 1 cent cost-of-living adjustment for every 1.32 index points' change in the U. S. Bureau of Labor Statistics Consumers' Price Index for Moderate Income Families in Large Cities. Old Series. The February 1951 Index of 184.2 shall continue to be used as the starting point in calculating changes in the cost of living. The effect of this will be to reduce the Cost-Of-Living Allowance payable for the current quarter from 7 cents to 6 cents per hour."

Although the rules of the arbitration permitted but did not require it, the arbitrator delivered with the award, and stapled to it, a twenty-two page opinion. As directed in the first paragraph of the award, a reduction of 9.75 cents an hour

in all "base rates," as that expression is used and applied in the company's wage system, would result in an average decrease of substantially 11.7 cents per hour in the actual earnings of pieceworkers. This decrease would affect 750 employees. Certain other facts found by the court will be mentioned when the legal claims advanced by the parties are discussed.

The problems presented by this appeal readily group themselves into two main divisions, of which one deals exclusively with the first, and the other with the second, paragraph of the award. The court concluded that the former was void because it went beyond the submission and, in any event, because it was not a final and definite answer to the question to which it purported to respond.

Early in our judicial history we expressed the view that, since arbitration is designed to prevent litigation, it commands much favor from the law. *Parmelee* v. *Allen*, 32 Conn, 115, 116; see *Mallory* v. *Town of Huntington*, 64 Conn. 88, 95, 29 A. 245. Especially is it to be encouraged as a means of promoting tranquility and the prompt and equitable settlement of disputes in the field of labor relations. *Colt's Industrial Union* v. *Colt's Mfg. Co.*, 137 Conn. 305, 309, 77 A.2d 301. It is true, however, that the submission should set forth the questions to be resolved in such a manner as to show clearly what disputes are to be arbitrated. *International Brotherhood of Teamsters* v. *Shapiro*, 138 Conn. 57, 68, 82 A.2d 345. Clarity is important because the source of the arbitrator's authority is found in the agreement of submission. "The charter of an arbitrator is the submission and no matter outside the submission may be included in the award. *Palmer* v. *Green*, 6 Conn. 14, 18; *Hamlin* v. *Norwich*, 40 Conn. 13, 23; *Schoolnick* v. *Finman*, 108 Conn. 478, 481, 144 A. 41; Sturges, Commercial Arbitrations & Awards, pp. 144, 229; Russell, Arbitration & Award (13th

Ed.) pp. 201, 210, 211." *Pratt, Read & Co.* v. *United Furniture Workers*, 136 Conn. 205, 208, 70 A.2d 120.

It necessarily follows that an award must conform to the submission. *Chase Brass & Copper Co.* v. *Chase Brass & Copper Workers Union*, 139 Conn. 591, 594, 96 A.2d 209; *Continental Milling & Feed Co.* v. *Doughnut Corporation*, 186 Md. 669, 677, 48 A.2d 447; *Baldwin* v. *Moses*, 319 Mass. 401, 402, 66N.E.2d 24; 6 Williston, Contracts (Rev. Ed.) §1929. Ordinarily, an award which does not respond to the submission cannot be upheld. *Blackstone Valley Gas & Electric Co.* v. *Rhode Island Power Transmission Co.* 64 R.I. 204, 223, 12 A.2d 739; *Pumphrey* v. *Pumphrey*, 172 Md. 323, 325, 191 A. 235. It is void to the extent which it is outside the submission. *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 301, 169 N.E. 386. To that extent the award must be vacated by the Superior Court upon proper application. General Statutes §8161 (d).

On the other hand, if part of an award is within the submission and part of it is not, the former may be sustained and the latter rejected if the two can be separated without doing an injustice. *Parmelee* v. *Allen*, 32 Conn. 115, 116; *Moore* v. *Luckess' Next of Kin*, 64 Va. 160, 171; *Moyer* v. *Van-Dye-Way Corporation*, 126 F.2d 339, 341; 6 Williston, Contracts (Rev. Ed.) p. 5395; Sturges, Commercial Arbitrations & Awards, § 226; 3 Am. Jur. 957; C.J.S. 234; see *Dutton* v. *Gillet*, 5 Conn. 172, 175 n. In accord with this principle, § 8162 of the General Statutes provides that the Superior Court may modify or correct an award "(b) if the arbitrators shall have awarded upon a matter not submitted to them unless it be a matter not affecting the merits of the decision upon the matters submitted. . . The order shall modify and correct the award, so as to effect the intent thereof and promote justice between the parties." The use of the word "unless" in this portion of the statute is confusing, but obviously the intendment of the enactment is

that the court may strike out such portion of an award as is not responsive to the submission if, by so doing, the merits of the portion of the award which is within the submission are not affected.

We will first apply the principles of law which we have just recognized to the question whether the award made upon the first paragraph of the submission should be corrected and, as corrected, sustained. The submission itself is inartifically drafted. It does not necessarily follow, however, that it is insufficient to form the basis of an award. *Matter of Hub Industries (George Mfg. Corporation)*, 183 Misc. 767, 769, 54 N.Y. S.2d 106, modified, 269 App. Div. 177, 54 N.Y.S.2d 741, aff'd, 294 N.Y. 897, 63 N.E.2d 28. It sets forth with reasonable clarity that the gist of the question to be arbitrated is whether there should be such an adjustment in the wage scale of the defendant as would offset the wage increase of March 26, 1951. It is true that it indicates that such an adjustment may be accomplished by a direct decrease of 9.75 cens per hour for all employees. This latter portion of the submission, if taken literally, is inconsistent with the former. As has already been shown, if the pieceworkers, the employees on the hiring rate and those on the plant minimum rate were all reduced by 9.75 cents per hour, their wages would be less than they were prior to March 26, 1951. When, however, it is borne in mind that the raises granted in 1951 were all computed by starting with a raise of 9.75 cents per hour for the hourly employees, it becomes clear that there is no inconsistency between the two concepts expressed in the first paragraph of the submission. A reduction of 9.75 cents per hour in the hourly rates paid would come to the same end as a reversion to the wage structure as it was prior to March 26, 1951, if the reduction in the hourly rates is taken as a base for the computation of the reduction in the pay of those workers not on an hourly basis, just as an increase of 9.75 cents an hour for the hourly workers was taken as a

base for the increase in the pay of all other workers on March 26, 1951. We therefore repeat that the question submitted to the arbitrator was whether the wage increase of March 26, 1951, should be offset by a basic reduction of 9.75 cents per hour, from which basic reduction the actual reduction of the pay of each employee could be computed by adjustment.

The next question is whether the award is within the submission. In one particular it is not. The arbitrator decided that not only hourly rates but also "base rates" should be reduced by 9.75 cents. In the submission nothing was said concerning base rates. Indeed, it is found by the trial court that nothing was said about any such rates in the course of the hearings before the arbitrator. Just what the arbitrator meant by his reference to "base rates" is, therefore, uncertain. However that may be, the bald fact is that any award which the arbitrator attempted to make concerning base rates was entirely outside of the submission. Consequently, under § 8162 (b) and the authorities cited above, the award should be modified by striking therefrom all reference to "base rates" if that can be done without affecting the merits of the balance of the award or doing an injustice to the parties.

If the words "and base rates" are stricken from the award, there is left an adjudication that all hourly rates shall be reduced 9.75 cents, and piece rates and plant hiring minimum rates adjusted accordingly. This adjudication is a complete and reasonably definitive award. See *Brown* v. *Wheeler*, 17 Conn. 345, 352. The phrase "plant hiring minimum rates" in the award is clearly intended to embrace both hiring rates and plant minimum rates. When so interpreted, the award covers the pay of all classes of the defendant's employees except engravers. The effect of it is to direct a reduction in the pay of hourly workers by 9.75 cents per hour and a corresponding reduction in the pay of pieceworkers, employees who are on the

hiring pay basis and employees who are receiving the plant minimum wage. The reduction in the pay of the last three groups is not to be 9.75 cents per hour; it is to be a reduction computed so that it will be equivalent to a reduction of 9.75 cents per hour in the pay of hourly workers. In effect, therefore, the award is that the pay of each of these four classes of employees shall be reduced by an amount that will offset the increases they received as of March 26, 1951.

So far as the engravers are concerned, there is nothing specifically said about them in the submission. Inasmuch as the crux of the submission was the question whether the increases in pay of March 26, 1951, should be offset and inasmuch as the engravers received no increase at that time, it cannot fairly be said that any question concerning their pay was involved in the submission. It follows that nothing in the award can be interpreted as an order for a reduction of their pay.

Thus it appears that the award without the words "and base rates" is a complete award answering the question submitted in the affirmative. It is also clear that inasmuch as no consideration of base rates, whatever they may be, was had on the hearing, the removal of all reference to them from the award cannot affect the merits of the decision of the arbitrator concerning the reduction in the pay of the four classes of employees covered by the award. The trial court was, therefore, in error in refusing to correct the award by removing from it the reference to base rates. When so corrected, the award would have been within the submission.

We next consider the second ground upon which the trial court concluded that the first paragraph of the award should be vacated, i.e., that the award lacks finality and definiteness.

It is true that an award must be final as to the matters submitted so that the rights and obligations of the parties may be definitely fixed. *Carter* v. *Ross*, 2 Root 507, 508; *Parkhurst* v. *Powers*, 2 Root 531; *Mercury Oil Refining Co.* v. *Oil Workers International Union*, 187 F.2d 980, 982; *McInnish* v. *Lanier*, 215 Ala. 87, 109 So. 377; *LeBlanc* v. *Beard Paper Co.*, 320 Mich. 632, 641, 32 N.W.2d 73; *Park Construction Co.* v. *Independent School District*, 216 Minn. 27, 33, 11 N.W.2d 649; *Matter of Pfeiffer, Inc.*, 222 App. Div. 62, 63, 225 N.Y.S. 294, aff'd, 251 N.Y. 508, 168 N.E. 407; *Maw* v. *Kitzman*, 55 N.D. 463, 467, 214 N.W. 273; 6 Williston, Contracts (Rev. Ed.) p. 5397; 3 Am. Jur. 947, § 125. As has been pointed out, however, the award in the present case is definitive. It does not in detail fix the pay of employees individually. It does, nevertheless, as we have interpreted it, establish the method by which each individual's pay may be fixed. It determines the principle by which the pay of each of the four classes of employees is to be computed. That is, it decides that all employees shall take a reduction of pay which is the equivalent of a reduction of 9.75 cents per hour to hourly employees. When read in connection with the submission, it means nothing more nor less than that the pay of each class shall be reduced to what it was before March 26, 1951. Under the circumstances, an award could hardly be more definitive and enforceable than that. When confirmed, it will have an effect closely akin to that of a declaratory judgment.

There remains for consideration the award embraced in paragraph, 2, namely, the change in the cost-of-living formula. In its complaint, the union alleged that this part of the award should be nullified not only because it went beyond the submission but also because the escalator clause was not subject to arbitration unless the parties expressly so agreed. The court refused to pass upon the latter claim but vacated the award on the ground of the former.

That the arbitrator went beyond the submission is clear. Instead of limiting himself to deciding whether the cost-of-living formula should provide for adjustment upon a change of 1.32 points in the index rather than 1.153 points, he undertook, after answering that question affirmatively, to apply the formula to the wage scale. This part of the award presented the ground upon which the court acted. As has been pointed out, when an arbitrator exceeds his authority, the award is void only to the extent that he does so, if the part which is void can be separated from the rest without injustice and without affecting the merits of the part of the award which is within the submission. The award set forth in paragraph 2 is one in which the good can readily be separated from the bad with justice to both parties. The valid part of the award is that which raises the required change in index points to 1.32 beginning with the first pay-roll period which commences after December 31, 1952. The arbitrator's notion of how the new formula should apply can readily be nullified without injustice to anyone. For this reason, the court was in error in vacating the entire award in paragraph 2. The award should have been corrected by striking therefrom all of the language except the following: "Beginning with the first payroll period which commences after December 31, 1952, Section 9 of the collective bargaining agreement between the parties dated August 1, 1952 shall be modified so as to provide for a 1 cent cost-of-living adjustment for every 1.32 index points' change in the U. S. Bureau of Labor Statistics Consumers' Price Index for Moderate Income Families in Large Cities, Old Series." Judgment should enter confirming the award as thus corrected.

There is no merit to the union's claim, alleged in its complaint, that the question of a modification of the escalator clause was not arbitrable. Section 12(B) of the bargaining agreement provides that differences arising between the company and the union as to the meaning and application of the

provisions of their agreement, or "in regard to any other matters," shall be settled by a procedure which leads, when necessary, to arbitration; and § 15 of the agreement expressly provides that either party may seek a modification of any provision at any time.

There is error, the judgment is set aside and the case is remanded with direction to render judgment modifying and correcting the award as indicated in this opinion and confirming the award as so modified.

In this opinion WYNN, DALY *and* MOLLOY, Js., concurred.

O'SULLIVAN, J. (dissenting). The result reached by the majority is as stunning as it is incredible. Legal principles which this court has carefully developed for over a century in order to further the cause of arbitration have been summarily swept aside after receving casual lip service and have then been ignored as completely as if they never existed.

The modern judicial attitude toward arbitration is that its use should be encouraged. *International Brotherhood of Teamsters* v. *Shapiro*, 138 Conn. 57, 68, 82 A.2d 345. But however sympathetic the law may be toward this method of terminating controversies, arbitration must be carried out, not in some haphazard fashion suiting the fancy of the parties or the arbitrators, but pursuant to recognized rules of long standing. The need for adherence to legal principles is particularly apparent in those cases where, as here, one of the parties is seeking to convert an award into a judgment.

My disagreement with the majority is limited to the phase of the award, covered by paragraph 1, which deals with a proposed reduction in pay. My dissent is based on three grounds.

First, the award was void since it went beyond the terms of the submission. *Chase Brass & Copper Co.* v. *Chase Brass & Copper Workers Union*, 139 Conn. 591, 594, 96 A.2d 209. It is, of course, true that when an arbitrator acts partly within and partly beyond the authority derived from the submission, only so much of the award is void as lacks authority to support it, provided the part which is void can be separated from the rest without injustice. 6 Williston, Contracts (Rev. Ed.) p. 5395; Sturges, Commercial Arbitrations & Awards, § 226; 3 Am. Jur. 957; 6 C.J.S. 234; see *Dutton* v. *Gillet*, 5 Conn. 172, 175 n. The award in the case at bar is so worded that it is legally impossible to separate the valid from the void. Thus, if so much of it is upheld as reduces the hourly rates by 9.75 cents, one is confronted by the fact that there is nothing in the award, as I shall later point out, which warrants the reduction in piece rates. The injustice, then, is that one half of the employees are reduced in pay by almost ten cents an hour while the pay of the other half remains unaffected. Like the Gordian knot, the award is incapable of being untied so that the good may be isolated from the bad. Both are inextricably bound together, and they cannot be separated by the use of a legal meat ax.

Second, the award cannot be corrected, since the merits of the controversy would be affected. *Pratt, Read & Co.* v. *United Furniture Workers*, 136 Conn. 205, 208, 70 A.2d 120; General Statutes § 8162.

Third, the award, whether viewed in its original or in its corrected form, lacks finality and definitude. Certainty is an indispensible requirement of a legal award. If it is deficient in this respect, it cannot be upheld. It must leave no loophole for future dispute on the matter submitted. See 3 Am. Jur. 947, § 125. "It is essential to the validity of an award that it be final, that is, a termination of the question under

arbitration, . . and be capable of being made the subject of a judgment or decree. Further, the award must be certain in the sense that no reasonable question can be made as to its meaning." 6 Williston, op. cit., p. 5397.

The majority have ordered the court to render a judgment which will incorporate the following corrected paragraph in the award:

"1. Beginning with the first payroll period which commences after December 31, 1952, all hourly rates shall be reduced by 9.75 cents. *Piece rates and plant hiring minimum rates shall be adjusted accordingly.*"

The majority do not direct the court to state in the judgment how the second sentence, which I have italicized for emphasis, is to be carried out, since there is nothing in the award to inform the reader what method the arbitrator had in mind. Indeed, the second sentence provides one of the unsolved mysteries of the case. Undoubtedly the arbitrator knew what he meant by the language he used but it is conceded that nobody else did.

For example, after receiving the award, the defendant, apparently not comprehending what the arbitrator had decided, conferred with the plaintiff and proposed that the award be determined to mean the following: "1. The hiring rate would be reduced from $1.00 per hour to $.94 per hour, the rate in effect prior to the March 26, 1951 increase. 2. The minimum rate would be reduced from $1.15 per hour to $1.10 per hour, the rate in effect prior to the March 26, 1951 increase. 3. Employees who are on minimum rate jobs, that is, who are receiving $1.15 per hour will be reduced 5c per hour. 4. Employees who were receiving the plant minimum of $1.10 prior to March 26, 1951 were increased $0.0975 as of

that date, therefore, they will be reduced by the same amount. 5. Hourly rate workers other than those mentioned above will be reduced by $0.0975 per hour and new hourly rates will be issued not later than January 8, 1953 for all employees on the hourly rate basis. 6. For pieceworkers, there will be $0.0975 per hour deducted from the piecework earnings of each employee until the Timestudy-Standards Division has time to issue new piece rates which, it is expected, will be completed in time to use on March 2, 1953. 7. Piecework base rates would revert to the same base rates as were in effect prior to the March 26, 1951 increase. . . ."

It further developed, as the finding shows, that when the defendant was unable to convince the plaintiff that the parties should agree to these seven propositions as determinative of what the award meant, the defendant suggested that the plaintiff go to the arbitrator to obain his interpretation of the award. Needless to say, the suggestion was ignored.

The majority now direct the court to ripen this meaningless award into a judgment, without giving any clue as to how the piece rates and plant hiring minimum rates can be determined. It seems to me that in the light of the foregoing discussion the award, now to be altered into a judgment, cannot be characterized either as final, complete or definitive.

For the foregoing reasons, I cannot agree with the majority.

MOTION FOR REARGUMENT

Plaintiff-appellee hereby respectfully makes this motion for reargument on the folowing grounds:

1. The Court in construing the submission did not take into consideration the fact that employees receiving the plant

"minimum rate" were paid on a flat hourly basis and received an increase in March, 1951 of only five cents per hour; that those employees receiving the "hiring rate" were paid on a flat hourly basis and received an increase in March, 1951 of only six cents per hour and that, therefore, a reduction of 9.75 cents an hour in the hourly rates paid, which include those receiving the plant minimum rate and the hiring rate would not come to the same as a reversion to the wage structure as it was prior to March 26, 1951. Thus the basic premise on which the court's decision rests is erroneous.

2. The question decided by the Court of whether the escalator clause of the Union's contract is subject to arbitration under the contract was not before the Court, not having been decided by the lower court.

3. The Court's holding that the escalator clause was arbitrable under sec. 12(B) of the contract has far reaching effects going beyond the scope of the present case. It constitutes an adjudication that all contract provisions laboriously negotiated by the parties and agreed upon for a term of five years are subject to modification by arbitration. This question was determined by the Court without affording either party an opportunity to be heard thereby depriving the plaintiff of property without due process of law and depriving it of equal protection of the laws both in violation of Article XIV of the Constitution of the United States of America.

4. The Court in correcting and modifying the award and in construing the award as so modified and corrected did not take into consideration the fact that employees receiving the plant hiring rate and the minimum rate were paid on an hourly basis. The award as corrected and modified by the Court and interpreted by the Court as so modified and corrected directs a reduction in pay for these employees below

the increase they received in March, 1951, to which the submission was restricted, and thereby deprives them of property without due process of law and of equal protection under the law both in violation of Article XIV of the Constitution of the United States of America.

5. The submission of the issues to arbitration was restricted to a reduction in pay for "all employees covered by the current agreement" and did not therefore include engravers who were not covered by the agreement. The award as modified and corrected by the Court is not restricted to employees covered by the agreement and directs a decrease in engraver's wages of 9.75 cents per hour thereby depriving them of due process of law and of equal protection of the laws both in violation of Article XIV of the Constitution of the United States of America.

6. The award as modified and corrected by the Court directs an adjustment in piece rates without any limitation whatsoever on such "adjustment". The submission was restricted to whether or not plaintiff's piece workers should accept a decrease to offset the March 26, 1951 increase. The Court in directing the award to be affirmed as modified and corrected by the Court deprived plaintiff's piece workers of their property without due process of law and equal protection of the laws both in violation of Article XIV of the Constitution of the United States of America.

7. Defendant appellant in the trial court and on its appeal to this Court, both in its brief and oral argument, argued the merits of the issues submitted to the arbitrator for determination. It presented to this Court matters bearing on the merits that were either excluded by the lower court or not offered. Plaintiff-appellee believing itself bound by the statute and the previous decisions of this Court to the effect that the

Court is empowered to make only technical corrections in arbitrators' awards refrained from presenting its case on the merits and the equitable considerations in its favor. The Court in overruling its previous decisions that only technical corrections could be made under the statute and making a determination affecting the merits without affording Plaintiff an opportunity to present its evidence on the merits, make its arguments and point out the equitable considerations in its favor deprived Plaintiff of due process of law and denied to it equal protection of the laws in violation of Article XIV of the Constitution of the United States of America.

Filed
~~Tried~~ *June 12, 1954*

DECISION ON MOTION FOR REARGUMENT

Granted as to paragraph 1. Denied as to Paragraph 2-7. Reargument to be heard at the October Term 1954.

June 16, 1954. By the Court, INGLIS C.J.

APPENDIX C

Miscellaneous:

Pertinent Section of Agreement between Cheney Bros. and Local 63, Textile Workers Union, C. I. O. of August 1, 1952.

Section 5. Wages

A. Except in the case of learners and handicapped people, no employe shall receive earnings of less than the established plant minimum for the workweek. (See Appendix B for plant minimum.)

B. Learners who have served an apprenticeship of less than six weeks shall receive earnings of not less than the established plant hiring minimum for the workweek. After six weeks they shall receive at least the established plant minimum. (See Apendix B for hiring minimum.)

C. The rate of pay for handicapped people shall be commensurate with the ability to do the work assigned.

D. The Company or the Union may reopen the question of basic rates of pay per unit of time or minimum wages, with intent to make changes, but no such change shall be made effective less than thirty days after notice is given in writing of such intent. This notice does not apply to changes in work assignment.

E. Any difference which may arise with respect to the Company's action in these matters shall be handled in accordance with Section 12 (Adjustment of Grievances.)

Section 9. Cost-of-Living Allowance

Employees shall receive a cost-of-living allowance in accordance with changes in the U. S. Bureau of Labor Statistics Consumers Price Index for Moderate Income Families in Large Cities — Old Series. Adjustments shall be made four times a year, either upward or downward, effective the first Monday in July, October, January and April based upon the Index for May, August, November and February respectively. The amount of the allowance shall be 1c added or deducted for each 1.153 point change in the Index using the February 1951 Index of 184.2 as the starting point. In no case shall deductions be in excess of the amount added subsequent to March 26, 1951 for cost-of-living adjustments. In the event that the Index is not published in time to make an adjustment as provided above, such adjustment shall be made effective on the Monday following receipt of the Index. No adjustment shall be made due to any subsequent revision of any published Index figure.

Section 12. Adjustment of Grievances

A. The Company agrees that it will not bargain with any individual or group of individuals other than representa-

tives of the Union on all matters regarding wages, hours, and working conditions, excepting personal matters and matters of ordinary shop routine. Provided, That nothing herein shall be construed to deprive any individual employee or a group of employees of the rights specified in the Labor-Management Relations Act of 1947.

B. Should differences arise between the Company and the Union or any employee as to the meaning and *application of the provisions of this Agreement, or in regard to any other matters,* there shall be no suspension of work on account of such differences. An earnest effort shall be made to settle such difference immediately, in the following manner:

(1) Between the departmental Union representatives and the Foreman;

(2) Between the Union grievance committee and the Superintendant;

(3) Between the Union grievance committee and the Industrial Relations Manager;

(4) Between the Union grievance committee and the Vice President in Charge of Manufacturing; and

(5) In the event that the dispute shall not have been satisfactorily settled in the manner outlined above within three weeks after either party receives written notice from the other of the existence of any such dispute, then at the request of either party the matter shall be referred to one or more impartial arbitrators to be appointed by mutual agreement of the parties hereto. If the two parties fail to agree upon the choice of an arbitrator or arbitrators within one week after the request for arbitration, then either party may request in writing to the other party that the matter be submitted to arbitration

under the Industrial Arbitration Rules, then obtaining, of the American Arbitration Association. Such arbitration proceedings shall be initiated immediately thereafter by the American Arbitration Association. The decision or award in arbitration shall be final and binding on all parties. The expense and salary incident to arbitration shall be paid jointly by the Company and the Union.

(6) The grievance committee for each mill or department shall be designated by the Union, the members of which will be afforded such time off as may be required to transact the business of the grievance committee.

Section 15. Termination Date and Modification

This Agreement shall continue in full force and effect until August 1, 1957 and from year to year thereafter until terminated by either party as hereinafter provided.

If either party desires to modify this Agreement at any termination date, such party shall give the other party written notice of such desire sixty days prior to such termination date. In such event, both parties agree to engage in conference to negotiate the desired modification.

If during the life of this Agreement and not at a termination date, either party desires to modify this Agreement, such party shall give the other party written notice of such desire sixty days prior to the date of such proposed modification.

In the event that either party desires to terminate this Agreement, written notice of such intention shall be given to the other party sixty days prior to the termination date of any year.

Section 464 Connecticut Practice Book of 1951.

"Sec. 464. *Rescripts; notice.* When this court has handed down an opinion in any case, the reporter shall send the rescript to the clerk of this court in the county where the original judgement was rendered and the clerk shall notify counsel of record; and the reporter shall also send a copy of the rescript to the clerk of this court for Hartford County in all cases where the original judgment was rendered in any other county. Notice of decisions upon motions and of orders of this court shall be given by the reporter to the clerks of this court as specified above."

Office - Supreme Court, U.
FILED
NOV 24 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 432

LOCAL 63
TEXTILE WORKERS UNION OF AMERICA, C. I. O.
Petitioner,

v.

CHENEY BROTHERS
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM K. COLE,
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750 Main Street,
Hartford 3, Connecticut.

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Statement

Effective August 1, 1952 petitioner and respondent entered into a five-year collective bargaining agreement governing the wages, hours and working conditions of respondent's production and maintenance employees, whom petitioner had for many years represented in such matters (Finding, pars. 1, 19, R., pp. 23, 25). A copy of this agreement was placed in evidence at the trial as Exhibit A and

has been certified into the record of this court; its material provisions are reproduced on pages 40 to 43 of the petition for certiorari. Among other things it prescribed, in Section 5, a procedure for the reopening and, if necessary, arbitration of questions of "basic rates of pay per unit of time or minimum wages" and also provided, in Section 12, for the adjustment and, if necessary, arbitration before the American Arbitration Association of differences "as to the meaning and application of the provisions of this Agreement, or in regard to any other matters."

On September 17, 1952 respondent reopened the general wage structure by asking petitioner to agree to (1) a wage reduction to offset a general increase which had previously been granted in March, 1951, and (2) a revision of the cost-of-living formula which had been established in Section 9 of the collective bargaining agreement (Finding, pars. 20, 25, R., pp. 26, 27). Petitioner refused to agree (*Id.*, par. 25) and on October 10, 1952 respondent submitted the disputes thus created to the American Arbitration Association (*Id.*, par. 27, R., p. 28). In November hearings on the merits were held for two days by an arbitrator appointed by the association. Both parties appeared and were heard (Finding, par. 31, R., p. 28), and neither then nor at any time before receiving the award did petitioner claim in any way that the arbitrator was without jurisdiction to decide the request submitted (*Id.*, par. 34, R., p. 29). The ensuing award sustained both of respondent's requests. As to the cost-of-living dispute the award read as follows (*Id.*, par. 36, R., p. 29):

> "2. Beginning with the first payroll period which commences after December 31, 1952, Section 9 of the collective bargaining agreement between the parties dated August 1, 1952, shall be modified so as to provide for a 1 cent cost-of-living adjustment for every 1.32 index points' change in the U. S. Bureau of Labor Statistics Consumers' Price Index for Moderate Income Families in Large Cities, Old Series. The Feb-

ruary, 1951, Index of 184.2 shall continue to be used as the starting point in calculating changes in the cost of living. The effect of this will be to reduce the Cost-of-Living Allowance payable for the current quarter from 7 cents to 6 cents per hour."

January 15, 1953 petitioner brought to the Superior Court for Hartford County its application (R., pp. 3-5) to have the entire award vacated on the claim that the arbitrator had exceeded his powers and so imperfectly executed them that a mutual, final and definite award on the subject matter had not been made (3 Conn. Gen. Stat., 1949, Sec. 8161(d)), it being specifically asserted with regard to the cost-of-living dispute (R., p. 4) that:

> "The award undertakes to revise the cost of living formula which is fixed by a contract provision (Section 9 Agreement, page 13, 'Exhibit A') and cannot be modified except in accordance with Section 15 of the contract which does not provide for submission to arbitration."

On January 26, 1953 respondent filed its amended answer and cross-application to correct the award (R., pp. 6-8). In that pleading, by Paragraph 4 of its first defense, respondent expressly denied the allegation just quoted.

During the trial and in its memorandum of law filed with the Superior Court [1] respondent urged that the cost-of-living allowance constituted one of the "basic rates of pay per unit of time" denominated arbitrable by Section 5 of the labor agreement (*Op. cit.*, pp. 22-30). Petitioner's brief in the Superior Court, on the other hand, contended (pp. 13-15) that in light of the circumstances under which the submission was made it was necessary to "examine the Contract to ascertain whether it contains any agreement

[1] Neither that memorandum nor petitioner's brief in the Superior Court constituted part of the record on appeal before the Supreme Court of Errors.

to arbitrate this issue," and then argued, without mentioning Section 12, that no such agreement existed. In this situation the Superior Court decided that since it considered the cost-of-living award fatally defective in any case, it was unnecessary to decide whether Section 12 conferred the power to arbitrate (Memorandum of Decision, R., p. 16).

Respondent appealed (R., p. 18). In due course the Superior Court filed its finding, which included the following paragraph (R., p. 33):

> "70. It is unnecessary to decide whether, if proper steps were taken under Section 15 of the contract, such modification [i.e., of the cost-of-living formula] would be a subject for arbitration under Section 12 of the agreement."

Respondent's assignment of errors (R., pp. 39-42) ascribed error to the decision of the trial court because judgment had been rendered for petitioner although, among other things, "The arbitrator did not exceed his powers in paragraph 2 of the award; * * *." (Assignment of Errors, par. 11(h), R., p. 42) This claim was further advanced by a short argument at pages 35 and 36 of respondent's brief in the Supreme Court of Errors. Petitioner's brief there, at page 20, recognized that the question of arbitrability was still in the case; but the opportunity to expand the issue was not taken.

Such is the background against which petitioner now claims that in correcting and confirming the award the Supreme Court of Errors invaded petitioner's constitutional rights by holding that power to arbitrate the cost-of-living dispute was conferred by Section 12.

Argument

Actually, the question of whether Section 12 empowered the arbitrator to modify the cost-of-living formula was inherent in the case from the beginning. The issue was

raised by petitioner's original application to the Superior Court, which denied the existence of any power in an arbitrator to make such a modification under any circumstances. That respondent chose to resist that contention by arguing that the modification constituted a revision in basic rates of pay per unit of time rather than a subject for arbitration under Section 12 hardly entitles petitioner to urge that the Supreme Court of Errors could not constitutionally take a different view.

Given that the broad issue of arbitrability was framed by the pleadings and pursued, as it was, by the parties, the Supreme Court of Errors clearly had the power to decide it. This proposition, at least, petitioner does not appear to challenge. In essence, the claim is that in making a decision the court was bound by the constitution to confine itself to the arguments and theories of law advanced by counsel. The fallacy of this proposition is obvious; one has only to realize that its logical extension means that where both parties to an appellate proceeding advance erroneous theories in support of their opposing contentions on a point of law, the court is bound to select either one or the other of these two mistakes unless it is not going to decide the case at all. A more acceptable concept, however, is that the office of an appellate court is to apply correct rules of law to the dispute presented by the record.

The whole question of the arbitrator's power, then, was present from the start. In addition there was clearly evidence in the appellate record from which the Supreme Court of Errors could conclude that Section 12 conferred that power. The contract alone constituted such evidence and, the interpretation of a written agreement being a question of law for the court, was plainly basis enough for a decision. Indeed, under the Parol Evidence Rule it is hard to conceive what further evidence might have been adduced on this issue, since petitioner originally offered the contract as representing the entire agreement of the parties in the premises. At any rate, petitioner's election not to go further

with its proof was a choice which it freely made. To persist in that election on appeal was also its free choice, and one that it adopted in the face of paragraph 70 of the finding (quoted above), which surely sufficed as notice, if any was needed, that a result along these lines remained a possibility.

Thus this record presents no real constitutional question.[2] It may be of interest to add that although in other respects this case was decided by a divided Supreme Court of Errors, there was no want of unanimity on the question here presented. See the third paragraph of Justice O'Sullivan's dissenting opinion, reproduced at page 34 of the petition for certiorari. Hence if the Connecticut court erred, it at least erred as a body. One may surmise that it did so because the course which it followed was entirely consistent with established appellate practice in this state:

> "• • • Section 363 of the Practice Book[3] provides: '*Errors Considered.* This court shall not be bound to consider any errors on an appeal unless they are specifically assigned and unless it appears on the record that the question was distinctly raised at the trial and was ruled on and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial.' Section 157 of the Practice Book[4] requires that in trials to the court if counsel intends to raise any question of law which may be the subject of an appeal he shall call the same distinctly to the court's attention. The plaintiff's contention rests upon these two provisions of the rules. *These do not, however, preclude this court from considering questions of law which were not raised before the trial court.* While we are not

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[2] In opposing the petition for certiorari respondent wishes to make clear that it does not necessarily agree with the substantive conclusion reached by the Supreme Court of Errors. This, however, is a matter of contract rather than constitutional law.

[3] Now Sec. 409, Conn. Practice Book (1951).

[4] *Op. cit.*, Sec. 154.

'bound to consider' such claims of error, and do not ordinarily do so, we have upon occasion considered a question which was not so raised, not by reason of the appellant's right to have it determined but because in our opinion in the interest of public welfare or of justice between individuals it ought to be done. [citing 10 cases]" *Leary* v. *Citizens and Manufacturers National Bank,* 128 Conn. 475, 478, 479, 23 A. 2d 863 (1942; emphasis supplied).

See also *Columbus Industrial Bank* v. *Miller,* 125 Conn. 313, 315, 316, 6 A. 2d 42 (1939); *Cunningham* v. *Cunningham,* 72 Conn. 157, 160, 44 A. 41 (1899); *Riggs* v. *Zaleski,* 44 Conn. 120, 121 (1876).

Conclusion

The petition for certiorari fails to present a substantial federal question and should therefore be denied.

Respectfully submitted,

William K. Cole,
Counsel for Respondent.